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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 1586

MARATHON OIL COMPANY, a corporation; and ROBERT LEHMAN, et al, d/b/a LEHMAN BROTHERS,
Petitioners

v.

GEORGE H. BRUCE; ROBERT MARTIN; and HON. LUTHER BOHANON, United States District Judge,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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NO. _____

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v.

GEORGE H. BRUCE; ROBERT MARTIN; and HON. LUTHER BOHANON, United States District Judge,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray for a writ of certiorari to review a judgment of the United States Court of Appeals for the Tenth Circuit issuing a writ of mandamus under the All Writs Act, 28 U.S.C. 1651(a), directing the district judge to grant a jury trial on Count I of a two-count amended complaint.[1]

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1. Count II of the amended complaint (R-3, Ex. "B", pp. 15-19) is an alternative claim against all of the petitioners, upon which relief is sought only "in the event the Court does not grant the equitable relief prayed for upon Count I" (R-3, Ex. "B", p. 18). The district judge ruled that in the event Count II is tried, the trial will be to a jury (R-3, Ex. "J", p. 2) and that ruling is not an issue in this proceeding.

OPINIONS BELOW

The majority and specially concurring opinions are not yet reported but are appended to this petition. (App. A).

JURISDICTION

The judgment of the Court of Appeals was entered on December 29, 1970 (App. B).[2] Petition for rehearing and rehearing en banc was denied on February 17, 1971 (App. C, D). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether there is a constitutional right under the Seventh Amendment to a jury trial of an action to impress on the grounds of an alleged misappropriation of confidential business information a constructive trust upon a long-term liquified natural gas sales contract between two American and two Japanese corporations and for an equitable accounting. Although the Tenth Circuit did not even mention that the principal relief sought by plaintiffs was impressing a constructive trust on the Japanese contract, nevertheless such is a fact because the relief plaintiffs sought was a "decree determining their *equitable right*" to participate with defendant Marathon in the Japanese contract and also determining the "precise *nature and extent*" of that equitable right. The accounting relief discussed by the Court was only secondary to the principal relief.

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2. The documents comprising the Transcript of Record certified by the Clerk of the Court of Appeals are listed in the Index thereto and will be referred to as "R-1", "R-2", etc., followed by a citation of the specific page number of the document or attached exhibit.

CONSTITUTIONAL PROVISION AND FEDERAL RULE INVOLVED

The Seventh Amendment to the Constitution of the United States provides as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Rule 38(a), F.R. Civ. P., 28 U.S.C., provides as follows:

> "(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

STATEMENT OF THE CASE

This mandamus action against the district judge and petitioners arises out of a proceeding brought in the United States District Court for the District of Kansas by the respondents George H. Bruce and Robert Martin as plaintiffs against petitioners Marathon Oil Company and 37 individuals alleged to be co-partners doing business under the name of Lehman Brothers as defendants. The basis for federal jurisdiction of the original proceeding is 28 U.S.C. 1332.

Count I of the amended complaint (R-3, Ex. "B", pp. 1-15) is an action against Marathon alone to impress a constructive trust upon its interest in a long-term liquefied natural gas (LNG) sales contract and for an

equitable accounting. The contract dated March 6, 1967, is between Marathon and Phillips Petroleum Company, American corporations, as sellers, and two Japanese utility corporations, as buyers. It is for a term of 15 years and provides for the sale and purchase of LNG, none of which is, or has ever been, owned by the plaintiffs in the original action. The gas is produced from leasehold estates owned by Marathon and Phillips in Alaska where it is liquefied and then transported by specially constructed ships to Japan.

Plaintiffs contend in Count I of their original action that they have equitable rights in the Japanese LNG project, and an equitable interest in the LNG contract, by virtue of an asserted breach by Marathon of fiduciary duties owed to them. The breach, so they claim, occurred in 1960 when they allege that Marathon wrongfully appropriated their confidential business information disclosed to it by them under an oral agreement of trust and confidence, and also wrongfully excluded them from participating with it in the sale of Marathon's LNG in Japan (R-3, Ex. "B", pp. 13-14).

They allege in Count I that in 1959 they and Lehman Brothers, whom they also name as defendants, formed a joint venture for the purpose of making detailed research, analysis and development of substantial markets for LNG in Japan; that pursuant to their joint venture agreement Martin and Lyon Terry, an experienced gas engineer in the employ of defendant Lehman Brothers, went to Japan where they made a comprehensive market survey and cost analysis involving the compilation and study of extensive data and information concerning the Japanese energy market, cost estimates of manufactured gas and

the price at which LNG would have to sell in order to be economically feasible in the Japanese market. They charge that while in Japan, Martin and Terry entered into negotiations with officials of two Japanese gas companies which ultimately resulted in a verbal agreement whereby, in consideration of plaintiffs undertaking further studies and attempting to develop a feasible source of LNG supply, the Japanese gas companies granted plaintiffs a right of first refusal to supply LNG to the Japanese market (R-3, Ex. "B", pp. 3-4).

It is also alleged that in the course of plaintiffs' efforts to locate a feasible source of LNG supply, they ascertained that Marathon had developed and had access to extensive natural gas reserves in the Kenai Peninsula of Alaska; that plaintiff Martin then contacted representatives of Marathon and informed them that he wanted to present a business proposal to Marathon upon a confidential basis; and that upon being assured by Marathon's representatives that all disclosures would be held in strictest confidence, Martin revealed the general nature and history of plaintiffs' and Lehman's proposed LNG project and disclosed the information which plaintiffs claim was subsequently wrongfully appropriated by Marathon (R-3, Ex. "B", pp. 4-5).

No claim, however, is made that Marathon ever actually agreed to join plaintiffs and Lehman Brothers in the proposed joint venture (R-3, Ex. "B", pp. 6-7).

It is, nevertheless, alleged by plaintiffs that the relationship between them and Marathon gave rise to, and imposed upon Marathon, the fiduciary duties which they allege it breached by appropriating to its own benefit their confidential information and data and by wrongfully

excluding them from the Japanese LNG project (R-3, Ex. "B", pp. 10, 14).

Plaintiffs also allege that by reason of the consummation of the Marathon-Phillips contract with the two Japanese utility companies, Marathon succeeded in appropriating the Japanese LNG market for itself and its associates, to their complete exclusion, and that their interests in, and equitable rights with respect to, the LNG project matured and vested (R-3, Ex. "B", p. 13). However, it appears that they are unable to allege with certainty the value or extent of their asserted equitable interest in Marathon's rights under the contract (R-3, Ex. "B", p. 14).

As stated earlier by way of relief on these allegations, plaintiffs' prayer in Count I is:

> "* * * [*F*]*or a decree determining their equitable right to participate with defendant Marathon in the aforesaid Japanese LNG project; that this Court adjudicate and determine the precise nature and extent of plaintiffs' said rights; that defendant Marathon be compelled to render a complete disclosure and accounting covering all details pertaining to said project; and that plaintiffs be granted any and all such further relief as the Court deems just and equitable* * * *" (R-3, Ex. "B", p. 15).

The district judge in denying plaintiffs a jury trial of Count I found and held that it was "pitched purely in equity, claiming an interest in a joint adventure" (R-3, Ex. "K", p. 31), and that the extremely complicated and technical problems involved in balancing the equities of plaintiffs' right to an interest in the project, and in the accounting which plaintiffs seek of money had and re-

ceived and to be had and received, not only for the past and present but also in years to come, were such that no jury on earth could understand them or be expected to give any kind of a fair answer (R-3, Ex. "K", pp. 31-41).

Thereafter, plaintiffs commenced this original proceeding in the Court of Appeals under Rule 21, F.R.A.P., 28 U.S.C., seeking a writ of mandamus to compel the district judge to grant them a jury trial on Count I. (R-3) On December 29, 1970, the Court entered judgment issuing the writ of mandamus (App. B). The majority opinion recognized that equitable relief in the form of an accounting was sought in Count I, but reasoned that under *Dairy Queen v. Wood,* 369 U.S. 469, the Court must look beyond the equitable relief sought and determine the true nature of the underlying claim (App., A-7). The majority then concluded that the underlying claim sounded in tort, upon which plaintiffs were entitled to a jury trial as a matter of right, and said their disposition of the matter was consistent with the rationale of such cases as *Ross v. Bernhard,* 396 U.S. 531; *Simler v. Conner,* 372 U.S. 221; *Dairy Queen v. Wood,* 369 U.S. 469; and *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (App., A-7-A-8). They completely overlooked that the accounting sought was only secondary to the primary equitable relief sought which is the creation in plaintiffs' favor of a constructive trust on Marathon's rights under the LNG sales contract.

Judge Holloway, in his concurring opinion, points out the primary error in the majority opinion by saying that it appears to treat as irrelevant the relief or remedy sought and then correctly holds that the Court must "look

at the nature of the remedies requested, among other things", citing *Ross v. Bernhard,* supra. But, he erroneously concludes that Count I is an action at law because the accounting claim "is viewed in substance as a money claim triable to a jury" (App., A-10).

REASONS FOR GRANTING THE WRIT

A. *Conflict with decisions of this Court.*

This case is of the utmost importance to the administration of justice in the federal courts for if the decision of the Court of Appeals is allowed to stand, it will cast aside completely the historic division between law and equity and enlarge the right to a jury trial in civil actions brought in the courts of the United States beyond the intendment of either the Seventh Amendment or the Federal Rules. In short, it will require a jury trial, when demanded, in suits in equity as well as actions at law. And, it will do so on a misconception of the doctrine announced in the *Beacon Theatres* case and later applied in the *Dairy Queen, Simler* and *Ross* cases, supra.

Whatever may have been the differences between the majority and minority in those cases, surely the majority opinions were not intended to nullify history, logic and over 100 years of firm precedent or to hold that a plaintiff has a constitutional right to a jury trial in a purely equitable suit to impress a constructive trust and for an accounting after such a trust has been impressed.

The majority opinion of the Court below, in determining whether Count I is equitable, simply ignores the basic equitable relief sought in Count I. It says at p. 11 (App., A-7) that "The fact that as concerns Count I equitable relief in the form of an accounting is sought does not

in and of itself preclude a right to a jury trial * * *", citing *Dairy Queen.* It thus would appear from the opinion that an accounting is the only equitable relief sought, which of course is not correct. Why the majority and concurring opinions fail to mention the basic equitable relief prayed for, and upon which an equitable accounting must depend, is not understandable. The relief plaintiffs seek is a *"decree determining their equitable right to participate"* in a contract to which they are not parties, and also determining the *"precise nature and extent"* of their equitable rights, together with an accounting. To grant the relief prayed for would necessitate a court of equity impressing a constructive trust of the "precise nature and extent" it might find equitable under the facts, upon Marathon's rights in the LNG sales contract subject to its liabilities under the contract.

The Seventh Amendment, by its express terms, does not extend, but merely *preserves,* the right to a jury trial "in all suits at common law." The right so preserved is limited to those actions which were triable to a jury under the common law of England as it existed in 1791 when the Amendment was adopted. *Baltimore & Carolina Line, Inc. v. Redman,* 295 U.S. 654. It does not extend or apply to suits in equity which were historically tried to the court. *United States v. Louisiana,* 339 U.S. 699; *Shields v. Thomas,* 18 How. 253.[3]

The *Beacon Theatres* doctrine is inapposite. There the Court merely held that the plaintiff did not have the right

3. The various Courts of Appeals have consistently held that there is no constitutional right to a trial by jury in an equitable action. See, e.g. *United States v. White County Bridge Commission,* 275 F.2d 529 (C.A. 7, 1960), cert. den., 364 U.S. 818; *Black v. Boyd,* 248 F.2d 156 (C.A. 6, 1957); *Gefen v. United States,* 400 F.2d 476 (C.A. 5, 1968), cert. den., 393 U.S. 1119.

to try its action in equity before the defendant tried its counterclaim and cross-action, which were actions at law. The actions involved the same issues, viz., whether the plaintiff had violated the Sherman and Clayton Antitrust Acts. Plaintiff had sought a declaratory judgment of no violation and injunctive relief restraining defendant from charging plaintiff with antitrust violations while defendant had by counterclaim and cross-action sought to recover treble damages for antitrust violations.

Although *Beacon Theatres, Dairy Queen, Simler,* and *Ross* hold that the Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action,[4] they do not hold that the relief sought is to be disregarded as the majority has done. Unlike in those cases, there is no joinder of "legal and equiable claims" in Count I of the amended complaint. We shall presently point out that, under the test established by this Court for determining such matters, Count I is a purely equitable claim.[5]

Furthermore, the *Beacon Theatres, Dairy Queen, Simler* and *Ross* cases are distinguishable from this case on the

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4. This is not to say, however, that the claim asserted is to be artificially broken down into abstract factual issues for the purpose of determining whether they are legal or equitable since as "a general proposition issues, in the abstract, are neither legal nor equitable, but their character must be determined from the proper nature of the claim or defense in which the issues are projected." 5 *Moore's Federal Practice* (2nd Ed.), ¶38.38[4], p. 307. "In the last analysis, the difference between an action at law and one in equity lies largely in the character of the relief sought or obtainable." 1 *Am. Jur. 2d, Actions,* § 7, p. 548.

5. The test for determining whether a claim is legal or equitable is by "considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries." *Ross v. Bernhard,* 396 U.S. at 538, footnote 10.

facts. In *Beacon Theatres,* the complaint stated a claim traditionally cognizable in equity, while the counterclaim stated a claim for money damages which was triable by a court of law. In contrast, no counterclaim is here involved. Moreover, in *Beacon Theatres* the Court recognized that an action to declare no violation of the antitrust laws and for an injunction to restrain charges of antitrust violations was an equitable action, even though a treble damage action based on violations would be triable to a jury.

In *Dairy Queen* the action was for breach of a trademark licensing agreement and for trademark infringement, for which a money judgment was sought in the form of an accounting. The Court simply held that an action at law, which had for its purpose the recovery of damages or a debt, could not be converted into a suit in equity merely by the device of seeking an accounting, unless the accounts between the parties were so complicated that only a court of equity could satisfactorily unravel them. In this case, the primary and basic claim of the plaintiffs is not to recover a debt or damages. Rather, they seek a decree impressing a constructive trust on Marathon's interest in a contract between it and other parties over whom the trial court, the Court of Appeals and this Court have no jurisdiction. In addition, unlike *Dairy Queen,* the accounting sought is not for money damages, and could only be rendered following a decree determining the precise nature and extent of plaintiffs' asserted equitable rights. Moreover, it could only cover accrued sums and not future amounts, if any.[6]

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6. The distinction between an accounting in a legal sense and an equitable accounting is discussed further in the next section of this petition.

The *Simler* case held that the right to a jury trial is determined by federal rather than state law in diversity cases and, unlike this case, it was an action at law to recover a debt or damages. The same is true of *Ross.*

Turning now to the standard for determining whether a claim is legal or equitable, this Court has said that the first of the three factors to be considered which requires "extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply."[7] However, it clearly was the rule under the common law of England that courts of equity had exclusive jurisdiction over trust relationships. III *Blackstone, Commentaries,* pp. 431, 439.[8]

Pomeroy says that there are two great classes of trusts, namely, those created by the intentional act of the party having dominion over the property and those created by operation of law. 1 *Pomeroy's Equity Jurisprudence (5th Ed.),* § 152, pp. 206-207. He then says that the class of trusts "which in this country especially affords the widest field for the jurisdiction of equity in granting its special remedies so superior to mere recoveries of damages, embraces those which arise by operation of law" and they are of two species, "resulting" and "constructive." Id., § 155, p. 209. A constructive trust "is raised by equity for the purpose of working out right and justice where there was no intention of the party to create such a relation" and if "one party obtains the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious manner, so that

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7. *Ross v. Bernhard,* 396 U.S. at 538.

8. The historical development and origin of uses and trusts and the assumption by the chancery courts of jurisdiction over them is set forth in an excellent discussion in 3 *Pomeroy's Equity Jurisprudence (5th Ed.),* §§ 976-986a, pp. 890-914.

he cannot equitably retain the property which really belongs to another, equity carries out its theory of double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner." Id., § 155, p. 210.[9]

It is therefore apparent that historically an action to impress a constructive trust or for the breach of a fiduciary duty was exclusively within the jurisdiction of equity. See, also, 27 *Am. Jur. 2d, Equity,* §§ 20, 63, pp. 542-544, 585; 54 *Am. Jur., Trusts,* §§ 3, 565, pp. 20-21, 440-441.

Moreover, this Court has also consistently held that where one party acquires the legal title to property, to which another has a better right, a court of equity will convert him into a trustee of the true owner. *Stark v. Starr,* 73 U.S. (6 Wall.) 402, 419; *Moore v. Crawford,* 130 U.S. 122; *Monroe Cattle Co. v. Becker,* 147 U.S. 47; *Prosser v. Finn,* 208 U.S. 67. This Court also recognized in *Ross v. Bernhard, supra,* 396 U.S. at 542, that allegations of "a breach of fiduciary duty" raise equitable issues.

The Court of Appeals, however, chose to ignore the foregoing principles apparently on the basis that the allegation of misappropriation of business and trade information disclosed under conditions of trust and confidence required it to conclude (1) that the action sounds in tort and (2) that it is therefore one at law, necessitating a jury trial, even though as clearly appears plaintiffs seek only equitable relief. The cases of *Smith v. Dravo Corp.,* 203 F.2d 369 (C.A. 7, 1953); *Harkobusic v. General American Transportation Corp.,* 209 F.Supp. 128 (W.D. Pa., 1962); and *Mann v. Tatge Chemical Co.,* 201 Kan.

9. See, also, 3 *Pomeroy's Equity Jurisprudence (5th Ed.)* § 920b, p. 618.

326, 440 P.2d 640, cited by the majority are all actions for money damages which is not the situation in the case at bar. Furthermore, the *Smith* and *Mann* cases were tried to the court, rather than a jury, and *Harkobusic* holds that suits for breaches of confidential relationships involving trade secrets, and for breaches of express promises not to disclose secrets, "may be brought in equity, and usually" are.[10]

The majority opinion, although ignoring the nature of the primary relief sought in Count I, does recognize that the secondary claim for an accounting in Count I is for "equitable relief." Not so in the concurring opinion. Judge Holloway holds that the accounting claim must be viewed in substance as a money claim triable to a jury. This holding clearly is not supported by the allegations of Count I. It is also contray to *Kirschner v. West Company,* 300 F.2d 133, 135-136 (C.A. 3, 1962) where the Court sets forth the test for determining whether an accounting is one in equity or at law by quoting the following from 4 *Pomeroy, Equity Jurisprudence,* § 1421:

> "The instances in which the legal remedies are held to be inadequate, and therefore a suit in equity for an accounting proper, are: 1. Where there are mutual accounts between the plaintiff and the defendant. . .

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10. The "Courts long have recognized that where the holder of a trade secret imparts it to another in confidence and that other person then appropriates it for his own use, equitable remedies may be invoked to right the wrong." *Servo Corporation of America v. General Electric Company,* 337 F.2d 716, 723 (C.A. 4, 1964). "It appears that one of the grounds upon which jurisdiction has been exercised by courts of equity to award relief where a trade secret has been used in violation of a confidence is the jurisdiction of equity over relationships involving trust or confidence." *Kirschner v. West Company,* 300 F.2d 133, 136 (C.A. 3, 1962).

> "2. Where the accounts are all on one side, but there are circumstances of great complication, or difficulties in the way of adequate relief at law. . .
>
> "3. Where a fiduciary relation exists between the parties, and a duty rests upon the defendant to render an account."

It should be abundantly clear from the foregoing discussion that the issues raised in Count I are equitable both in terms of the premerger custom with respect to the issues and the remedy sought.

The third factor to be considered is, of course, the practical abilities and limitations of juries. In this connection, the district judge ably and clearly announced from the bench the extremely complicated and technical problems that would be involved in attempting to try Count I to a jury (R-3, Ex. "K", pp. 31-41)[11] and said "No jury on

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11. The problems discussed by the district judge may be summarized in the form of the questions to be resolved as follows: What is the value of the gas reserves owned by Marathon in Alaska which must be determined in considering the contributions made by each of the parties (plaintiffs and Marathon) to the proposed joint venture and having made that determination what rate of interest would Marathon be entitled to receive for holding the reserves for seven years for the benefit of the project; how soon are the reserves going to be depleted and what happens if they should suddenly be exhausted; what are the costs of the capital outlay for constructing the pipeline from the gas wells to a seaport and for the liquefaction equipment and facilities and what percentage did, or should, plaintiffs pay on the capital outlay, if any, and if none, what percentage rate of interest should plaintiffs pay to Marathon, or vice versa, for furnishing the money; what should be done about obsolescence and replacement of the equipment; what part, if any, should plaintiffs pay of the cost of constructing the specially designed ships to transport the LNG and if none, then what rate of interest should they pay to Marathon, assuming it has put up the money and must repay the same; what about obsolescence of the ships; what should be done with respect to management costs on the project and the expenses of production and drilling; how should the rights of the parties be

earth, I think could understand" them or "do equity between the parties" (R-3, Ex. "K", pp. 32, 38).[12] Petitioners, in their petition for rehearing, mentioned other additional problems involved in attempting to try Count I to a jury. (R-14, pp. 12-14)

The majority opinion fails to discuss the reasons given by the district judge for trying Count I as an equitable action and the concurring opinion passes them off by saying that the accounting claim is not shown to be excessively complicated. The question of whether Count I presents such "imperative circumstances"[13] or is so extremely complicated and technical that it cannot be tried to a jury should not be decided from the pleadings. *Harkobusic v. General American Transportation Corp.*, 209 F. Supp. 128 (W.D. Pa., 1962). The district judge had the benefit of many depositions and affidavits,[14] which plaintiffs did not include in the record in the Court of Appeals, and his findings must be accepted because

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adjusted in the light of the risks imposed on Marathon in the project including the risks of failure of the gas supply and dealing with people in a foreign country who might say "We cancel the contract. We won't use any more of your gas"; what is the value of the discovery of the Japanese market as claimed by the plaintiffs and of the claimed confidential information and verbal agreement with the Japanese; and finally there is the element of the accounting plaintiffs seek from Marathon of moneys had and received and to be had and received, not only for the past and present but, also, in years to come.

12. It might also be said that no court on earth could properly and understandably instruct a jury on the complex issues such as those summarized in the preceding footnote.

13. See *Dairy Queen v. Wood*, 369 U.S. 469; *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500.

14. The depositions and affidavits were before the district judge in connection with the motion to dismiss for want of jurisdiction. (R-3, Ex. "D")

they do not appear to be clearly erroneous. Rule 52(a) F.R.Civ.P. Moreover, the findings of the district judge cannot be attacked because respondents in their original mandamus action did not include the record on which the district judge made his findings. See *Jensen v. United States,* 326 F.2d 891, 893 (C.A. 9, 1964).

The inescapable conclusion is that a consideration of the three factors clearly establishes that Count I is an equitable claim.

B. *Conflict with decision of another Court of Appeals.*

The majority and the concurring opinions are in conflict with the decision of the Court of Appeals for the Fifth Circuit in *Local No. 92, International Ass'n, S. & O. I. Wks. v. Norris,* 383 F.2d 735 (1967), where it was unequivocally held that issues such as those here involved in both the primary and secondary claims for relief are in name and in substance traditionally equitable. The Fifth Circuit therefore held that there was no mandatory right to a jury trial. In so holding, it gave full consideration to the *Beacon Theatres* and *Dairy Queen* cases and to one of its own prior decisions[15] and concluded that those cases had not "converted typical non-jury claims, or remedies, into jury ones" and were not "a catalyst which suddenly converts *any* money request into a money claim triable by jury."[16] (383 F.2d at 741)

The Fifth Circuit went on to discuss the distinction between an accounting in a legal sense and an accounting

15. *Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp.,* 294 F.2d 486 (1961).

16. This was the express holding by the Fifth Circuit in its earlier case of *Swofford v. B & W Inc.,* 336 F.2d 406 (1964).

in equity and distinguished *Dairy Queen* saying that "we construe the present complaint not as seeking 'damages in the legal sense' but rather 'requesting an equitable accounting wherein damages may be determined . . .'" and that framing "the prayer for relief of the complaint in terms of an 'accounting' was neither an empty verbal formalism nor a sham employed merely to defeat Thacker's right to a jury determination of the extent if any, of his breach of trust." It then analogized the fiduciary responsibilities involved in the case with those of a trustee and recognized that traditionally "the remedies of the beneficiary of a trust against the trustee were exclusively within the jurisdiction of equity." (383 F.2d at 741)

The case at bar is indistinguishable from the Fifth Circuit decision. The basis for relief and the issues involved are identical. Count I of the amended complaint requests "an equitable accounting" rather than "damages in the legal sense" and the prayer is "neither an empty verbal formalism nor a sham employed merely to defeat" the right to a jury trial. The only difference between the two cases is that in the case at bar the district judge, as previously discussed, has made express findings on "the exceedingly complex nature" of the issues raised, and accounting sought, in Count I.[17]

The two decisions are in irreconcilable conflict which should be resolved by this Court on review by writ of certiorari.

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17. This Court recognized in *Dairy Queen* that even the right to a jury trial on *legal issues* could be lost under "imperative circumstances". (369 U.S. at 472-473; and see the concurring opinion of Mr. Justice Harlan, 369 U.S. at 480).

C. *Exercise of the power of supervision.*

This is also one of those rare cases in which certiorari should be granted because the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to plainly call for the corrective exercise of this Court's power of supervision. As we have pointed out, Count I is a purely equitable claim and the accepted and usual course of judicial proceedings from time immemorial has been to try such claims to the court. The Court of Appeals has nevertheless by means of the extraordinary writ of mandamus, ordered the district judge to grant plaintiffs a jury trial on their equitable claim. There is no basis in history, logic, the Constitution or the decisions of this Court for that action and it should be corrected by the exercise of this Court's power of supervision.

Beyond the purely legal basis, however, there are also policy considerations which make the Court's virtually unlimited enlargement of the Seventh Amendment right to trial by jury improvident as well as unwarranted. It is common knowledge that the American system of jurisprudence is today facing its greatest crisis. One of the most alarming and troublesome areas contributing to, if not creating, the crisis is the unprecedented backlog of cases and the congested calendars of almost every federal court in the United States.

It has been suggested that one of the solutions to the problems in our system is to restrict the right to a jury trial[18] for there can be no doubt that jury trials are more expensive and time consuming than court trials. However,

18. See Warren E. Burger, Agenda for Change, 54 *Am. Jud. Soc.*, pp. 232-236.

under the decision of the Court of Appeals, the right is not restricted. Rather, it is enlarged to such an extent that litigants will not only be entitled to a jury trial in actions at law but also in equity suits. Such a result can only further aggravate an already serious situation. It should be corrected by directions from this Court to return, once again, to the time-honored principle of trying equitable claims to the court, rather than a jury.

Respectfully submitted,

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APPENDIX

United States Court of Appeals
TENTH CIRCUIT

NOVEMBER TERM—1970

NO. 435-70

GEORGE H. BRUCE and ROBERT MARTIN,
Petitioners,

v.

HON. LUTHER BOHANON, UNITED STATES DISTRICT JUDGE, MARATHON OIL COMPANY, a Corporation; and ROBERT LEHMAN, et al, d/b/a LEHMAN BROTHERS,
Respondents.

Appeal from the United States District Court for the District of Kansas

(D.C. No. W-3901)

(Filed December 29, 1970)

Robert C. Foulston and Robert L. Howard (Foulston, Siefkin, Powers and Eberhardt on brief) for Petitioners.

No appearance for the Honorable Luther Bohanon.

Clayton L. Orn (Mark H. Adams, Floyd E. Jensen, Adams, Jones, Robinson and Manka on brief) for Respondents.

Before SETH, HOLLOWAY and McWILLIAMS, Circuit Judges

McWILLIAMS, Circuit Judge.

Bruce and Martin, petitioners in this court and plaintiffs in the trial court, filed with us a "Petition for Writ of Mandamus and/or Prohibition," naming as respondents therein the Honorable Luther Bohanon, a United States District Judge, the Marathon Oil Company, an Ohio corporation, and the individual members of a New York investment banking copartnership doing business as Lehman Brothers.

From the record before us it is learned that Bruce and Martin, as plaintiffs, filed in the trial court a complaint against Marathon, and that by amended complaint added Lehman Brothers as an additional party defendant.

The central issue in the instant proceeding concerns the propriety of the trial judge's determination that Count I of the amended complaint presents only so-called equitable issues which would be tried by the court, and not a jury. A review of this determination necessarily involves a rather in depth consideration of plaintiffs' lengthy amended complaint in an effort to ascertain the true nature of the proceeding. Hence, reference with at least a degree of detail must be made to the various allegations contained in the amended complaint.

Respondents (not including Judge Bohanon, who makes no appearance) in their brief characterize Count I as being "an action against Marathon alone for the alleged

wrongful appropriation in January 1960 of so-called confidential information which plaintiffs claim was disclosed to Marathon under an oral agreement of trust and confidence." Elaborating a bit, plaintiffs in Count I allege, among many other things, that they formed a joint venture with Lehman Brothers for "the purpose of detailed research, analysis, and development of the substantial Japanese market for LNG [liquefied natural gas]"; that Martin and an experienced gas engineer associated with Lehman Brothers then went to Japan and "conducted a comprehensive market survey and cost analysis concerning the Japanese energy market, cost estimates of manufactured gas and the price under which LNG would have to sell in order to be economically feasible in the Japanese market"; and that while in Japan their negotiations with officials of certain Japanese utility companies culminated in a verbal agreement that in consideration for further studies to be made by the plaintiffs they would be, and were, granted a first right of refusal as regards supplying LNG to the Japanese market.

It is further alleged in Count I that following Martin's return from Japan the plaintiffs undertook a study to determine possible sources of LNG adequate to supply the Japanese market requirements and that in the course of the study plaintiffs learned that Marathon had recently developed and had access to extensive natural gas reserves in the Kenai Peninsula of Alaska, for which there was seemingly no Alaskan market.

It was in this general factual setting, according to the allegations in Count I, that Martin then contacted Marathon and informed their representative that he "wanted to present a business proposal to defendant Marathon upon

a confidential basis." It is further alleged that after being assured that all disclosures made by Martin would be treated by Marathon in strictest confidence, Martin thereafter revealed the general nature and history of plaintiffs' proposed LNG project, and disclosed to Marathon plaintiffs' data, information, computations, market surveys, cost analyses, and their business contacts with appropriate Japanese officials.

Plaintiffs then go on to allege, and all in Count I, that Marathon and Lehman Brothers thereafter conspired and agreed that Marathon alone, and to the complete exclusion of the plaintiffs, would proceed to develop the Japanese methane market. Specifically, it is alleged that Marathon violated its fiduciary duty to the plaintiffs and appropriated to its own use plaintiffs' confidential information and wrongfully excluded plaintiffs from the Japanese LNG project, all of which came to fruition when Marathon and its associates, but not the plaintiffs, entered into contracts with the Tokyo Gas Company and Tokyo Electric Power Company.

It is on these several allegations that plaintiffs prayed for judgment on Count I, seeking by way of relief a determination of an equitable right to participate with Marathon in their Japanese LNG project and for an accounting in connection therewith.

As above indicated, Count II, unlike Count I, is directed at both Marathon and Lehman, but each and every allegation contained in Count I is incorporated in Count II by appropriate reference thereto. Additionally, and quite like certain of the allegations in Count I, it was alleged in Count II that Marathon and Lehman Brothers "conspired and joined together to exclude the plaintiffs

from further participation in the Japanese methane market, to facilitate and permit the defendant Marathon to usurp and wrongfully use the confidential information previously imparted to it by plaintiff Martin * * *." By way of relief, but in the alternative and in the event the court did not grant the relief prayed for in Count I, plaintiffs sought joint and several judgment against Marathon and Lehman in the sum of $10,000,000.

By answer Marathon and Lehman denied any conspiracy on their part or wrongful appropriation of any confidential business information imparted to either by plaintiffs.

By pretrial order, the Honorable Luther Bohanon proposed, among many other things, to try the issues posed by Count I and Marathon's answer thereto before any possible trial of Count II. Additionally, and this is the heart of the present controversy, he determined that the trial of Count I would be to the court and not a jury, even though plaintiffs had filed a demand for trial by jury before any answer was filed. The trial judge gave as his reason therefor the fact that in his considered view Count I presented "equitable" issues, and not "legal" issues, at the same time indicating, however, that if, as, and when there was a trial of Count II, such would be to a jury. It was in this setting and at this juncture that plaintiffs, as petitioners in this court, filed a petition seeking, among other things, that the respondent judge be directed to grant plaintiffs a trial by jury on Count I of their amended complaint.

Initially, it is contended by counsel for Marathon and Lehman Brothers that mandamus is not the proper vehicle for obtaining review of the trial judge's ruling that

Count I would be tried to the court, and that petitioners should have sought such review by interlocutory appeal under 28 U.S.C. § 1292(b) or by appeal after final judgment. Counsel apparently concede that under certain circumstances a writ of mandamus may be a proper method for obtaining review of an interlocutory order of the trial court, but argue that such relief is not available in the "ordinary situation," and that the present proceeding is just an "ordinary situation." We do not agree.

In Dairy Queen v. Wood, 369 U.S. 469, in commenting upon Beacon Theatres, Inc. v. Westover, 359 U.S. 500, the United States Supreme Court declared that the Beacon case emphasizes the responsibility of Federal Courts of Appeal to grant mandamus where necessary to protect the constitutional right to trial by jury. In line with this pronouncement see General Tire & Rubber Co. v. Watkins, 331 F.2d 192 (4th Cir.); Filmon Process Corp. v. Sirica, 379 F.2d 449 (D.C. Cir.). In the latter case appears the following pertinent comment:

> "* * * [I]t is a fair inference that even on an application for an extraordinary writ for pre-trial relief the Supreme Court expects the courts of appeals to make a determination whether or not there is a right of trial by jury, regardless of whether the question is a close or complicated one, and that the Court would not welcome a doctrine whereby a party's constitutional right to jury trial was trammeled in fact because a court of appeals determined that the issue was doubtful and that it need not and would not decide whether or not the party had the right of trial by jury * * *."

As indicated, the real issue in the instant proceeding is whether under the Seventh Amendment to the Con-

stitution of the United States and Fed. R. Civ. P. 38(a) and 39(a), the petitioners, having made a timely demand for trial by jury, have a right to a trial by jury of Count I of their amended complaint. We conclude that the petitioners do have such a right and that the respondent judge erred in holding that the trial as it relates to Count I should be to the court.

Count I of the amended complaint, a lengthy pleading which has been above summarized, in essence alleges that the plaintiffs developed certain business and trade information which they disclosed under conditions of confidence to Marathon, and that Marathon thereafter wrongfully appropriated this confidential information to its own benefit and to the detriment of the plaintiffs.

The fact that as concerns Count I equitable relief in the form of an accounting is sought does not in and of itself preclude a right to a jury trial, as it has been declared that the right to trial by jury does not depend upon the choice of words used in pleadings. Dairy Queen v. Wood, 369 U.S. 469. See also King v. United Benefit Fire Insurance Co., 377 F.2d 728 (10th Cir.), cert. denied 389 U.S. 857. Rather, we must look beyond the relief sought and determine the true nature of the underlying claim upon which the prayer for relief is itself predicated. Viewed in this light, petitioners assert that Count I sounds in law—not in equity—and that the core issue as to whether there has in fact been a wrongful appropriation presents a legal issue which, under the circumstances, requires that Count I be tried to a jury. We agree.

In sum, Count I alleges that Marathon tortiously misappropriated business and trade information developed by the plaintiffs and given Marathon on a confidential

basis to the plaintiffs' detriment. We hold that such a claim sounds in tort. Restatement of Torts, § 757. See also Smith v. Dravo Corp., 203 F.2d 369 (7th Cir.); Harkobusic v. General American Transportation Corp., 209 F. Supp. 128 (W.D. Pa.); and Mann v. Tatge Chemical Co., 201 Kan. 326, 440 P.2d 640.

Robine v. Ryan, 310 F.2d 797 (2d Cir.) presents a somewhat analogous situation. There it was held that the allegation that one has been injured by another's wrongful appropriation to his own use of an invention divulged on the basis of a confidential relationship stated a legal cause of action which upon timely request should be tried by a jury.

Certainly the present trend in judicial thinking is to zealously guard the right to trial by jury, and we believe our disposition of the matter to be in harmony with the rationale of such cases as Ross v. Bernhard, 396 U.S. 531; Simler v. Conner, 372 U.S. 221; Dairy Queen v. Wood, 369 U.S. 469; and Beacon Theatres, Inc. v. Westover, 359 U.S. 500.

Finally, it is argued that even if the petitioners at one time had a right to trial by jury of Count I, they by their actions have now waived any right thereto. As above stated, petitioners filed a demand for trial by jury before Marathon and Lehman Brothers ever filed their answer. Hence their demand was timely filed. Fed. R. Civ. P. 38(b). However, it is said that prior to the filing of their demand petitioners waived their right to trial by jury. This argument is based on the fact that at an earlier hearing counsel for the petitioners indicated uncertainty as to whether Count I was legal or equitable in nature and

for the further reason that counsel did not object when the trial judge at one time indicated that *he* would try the issue of liability first and separate from the issue of damages. Suffice it to say in this regard that the matter relied upon as constituting a waiver simply does not add up to an intentional and voluntary relinquishment of a known right and falls far short of waiving the very basic right of trial by jury. The cases urged upon us in this regard are ones where the right to trial by jury was deemed waived by permitting the trial to be to the court, without any objection thereto, or where prior to actual trial there was expressed assent by counsel that the trial be to the court and not a jury. Such factual situations are far different from the instant one.

The petition insofar as it relates to petitioners' right to trial by jury of Count I is therefore granted. The balance of the relief prayed for by petitioners, however, is denied and we perceive of no good purpose in detailing our reasons therefor, inasmuch as the central issue is petitioners' right to trial by jury of Count I. The stay heretofore ordered by this court is vacated, with further proceedings to be consonant with the views herein expressed.

HOLLOWAY, Circuit Judge, concurring specially:

I agree with the majority opinion in its treatment of the issues before us, but on the central question of jury trial I add these brief comments to make clear my understanding as to why count one is triable to a jury.

The majority opinion appears to treat as irrelevant the prayer in count one which seeks relief in the form of an accounting, reasoning that we must look beyond the relief sought and its label to the underlying tort alleged, which is triable to a jury. While the characterizations in the pleadings are not controlling, we are called on to look at the nature of the remedies requested, among other things. See Ross v. Bernard, 396 U.S. 531, 538. In the light of Seventh Amendment principles the accounting claim—which is not shown to be excessively complicated —is viewed in substance as a money claim triable to a jury. Dairy Queen v. Wood, 369 U.S. 469, 477-478; AMF Tuboscope, Inc. v. Cunningham, 352 F.2d 150, 153 (10th Cir.). And since the issues on one of the remedies requested in the count are triable to a jury, the plaintiffs may not be denied a jury trial in the circumstances presented here. Beacon Theatres v. Westover, 359 U.S. 500.

APPENDIX B

NOVEMBER TERM - DECEMBER 29, 1970

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., and Honorable Robert H. McWilliams, Circuit Judges.

No. 435-70

George H. Bruce and Robert Martin,
Petitioners

v.

Hon. Luther Bohanon, United States District Judge,
Marathon Oil Company, a Corporation; and
Robert Lehman, et al., d/b/a Lehman Brothers,
Respondents.

This cause came on to be heard on petition for writ of mandamus and/or prohibition and responses thereto, and was argued by counsel. On consideration whereof, it is ordered that the stay heretofore ordered by this Court on September 3, 1970, is vacated, and the Court below is required in further proceedings to allow petitioners their right to trial by jury of Count I, with further proceedings to be consonant with the views expressed in the opinion. Holloway, Circuit Judge, concurring specially.

/s/ HOWARD K. PHILLIPS,
Clerk.

APPENDIX C

JANUARY TERM - FEBRUARY 17, 1971

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., and Honorable Robert H. McWilliams, Circuit Judges.

No. 435-70

George H. Bruce and Robert Martin,
Petitioners

v.

Hon. Luther Bohanon, United States District Judge,
Marathon Oil Company, a Corporation; and
Robert Lehman, et al., etc.,
Respondents.

Upon consideration of petition of respondents for rehearing, it is ordered that said petition be and is hereby denied.

APPENDIX D

JANUARY TERM - FEBRUARY 17, 1971

Before Honorable David T. Lewis, Chief Judge; and Honorable Oliver Seth, Honorable William J. Holloway, Jr., and Honorable Robert H. McWilliams, Circuit Judges.

No. 435-70

George H. Bruce and Robert Martin,
Petitioners

v.

Hon. Luther Bohanon, United States District Judge,
Marathon Oil Company, a Corporation; and
Robert Lehman, et al., etc.,
Respondents.

Upon consideration of the petition of respondents for rehearing en banc, it is ordered that said petition be and is hereby denied; Judge Hill, Circuit Judge, not participating.

SUPREME COURT, U. S.

FILED
MAY 26 1971
E. ROBERT SEAVER, CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 1586

MARATHON OIL COMPANY, a corporation; and ROBERT LEHMAN, et al, d/b/a LEHMAN BROTHERS
Petitioners

v.

GEORGE H. BRUCE; ROBERT MARTIN; and HONORABLE LUTHER BOHANON,
United States District Judge,
Respondents

BRIEF OF RESPONDENTS BRUCE AND MARTIN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 1586

MARATHON OIL COMPANY, a corporation; and ROBERT LEHMAN, et al, d/b/a LEHMAN BROTHERS
Petitioners

v.

GEORGE H. BRUCE; ROBERT MARTIN; and HONORABLE LUTHER BOHANON,
United States District Judge,
Respondents

BRIEF OF RESPONDENTS BRUCE AND MARTIN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW, JURISDICTION, CONSTITUTIONAL PROVISION, AND FEDERAL RULE INVOLVED

The above captioned requisites are adequately set out under the respective headings of the Petition For Certiorari, with the exception that the majority and specially concurring opinions of the United States Court of Appeals, Tenth Circuit, were reported on March 22, 1971, and may be found at 436 F.2d 733.

QUESTION PRESENTED

The question presented by this case is whether the Court of Appeals correctly decided the principal issue presented to it, namely;

> Does the Refusal of the Respondent Judge to
>
> A. Grant [Respondents] a jury Trial on All Issues, or
>
> B. Allow the Trial of Count II to a Jury, Before the Trial of Count I to the Court, or
>
> C. Allow [Respondents] to Withdraw Any Claim for Equitable Relief, or Otherwise Amend Their Complaint.
>
> Violate [Respondents] Constitutional Right to Trial by Jury as Embodied in the Seventh Amendment of the Constitution of the United States and Preserved by the Federal Rules of Civil Procedure? (R-3, p. 8)

It was precisely the foregoing issue which the Court of Appeals decided when it held:

> "As indicated, the real issue in the instant proceeding is whether under the Seventh Amendment to the Constitution of the United States and Fed.R.Civ.P. 38 (a) and 39(a), the petitioners, having made a timely demand for trial by jury, have a right to a trial by jury of Count I of their amended complaint. *We conclude that the petitioners do have such a right and that the Respondent Judge erred in holding that the trial as it relates to Count I should be to the court.* (436 F.2d at 735. Emphasis added.)

STATEMENT OF CASE

Nature of Action

The original diversity action out of which this Mandamus proceeding arose was first commenced in the United States District Court for the District of Kansas in October, 1967,

against Petitioner (defendant) Marathon Oil Company only, alleging tortious misappropriation of business or trade secret material developed by Respondents (plaintiffs) Bruce and Martin and disclosed to Marathon on a confidential basis during a confidential relationship. The general subject matter of the lawsuit concerns the market in Japan for Liquefied Natural [Methane] Gas [LNG], the conceptualization and development of a project by Bruce and Martin to capture such market by liquefaction and shipment by ocean of LNG, and the litigants' participation therein.

As a result of information disclosed by discovery procedures, Plaintiffs-Respondents Bruce and Martin filed an Amended Complaint in September, 1968, joining as additional defendants the New York based investment partnership known as Lehman Brothers (Petitioners Here). Both the Original and Amended Complaints were drawn on the single underlying theory of a business tort, based on breach of the duty owed by Petitioner(s)-Defendant(s) to Respondents-(Plaintiffs) arising out of confidential relationships and a proposal to form a joint venture. The Amended Complaint is drawn in two counts reflecting different types of relief sought, but arising from one underlying set of facts. Count I seeks relief against Marathon only by adjudication of the equitable right of Bruce and Martin to participate with Marathon in the Japanese LNG project; by an adjudication of the extent of those rights; and for a complete disclosure and accounting by Marathon concerning the project. Count II of the Amended Complaint incorporates all allegations of Count I and further alleges that both Marathon and Lehman Brothers breached their respective

duties owed to plaintiffs arising out of confidential and/or joint venture relationships, and that Marathon and Lehman Brothers conspired and joined together to exclude Bruce and Martin from participation in the Japanese methane project, for the profit of Marathon and Lehman Brothers and to the damage of Bruce and Martin. Count II seeks relief by judgment for damages of $10 million dollars against both Marathon and Lehman Brothers, and alternative relief against Lehman Brothers alone for damages of $10 million dollars or for the value of any claim against Marathon lost or diminished by the wrongful acts of Lehman.[1]

The Court of Appeals Summarized the nature of the action in essentially the foregoing manner when it held:

> "Count I of the amended complaint, a lengthy pleading which has been above summarized, in essence alleges that the plaintiffs developed certain business and trade information which they disclosed under conditions of confidence to Marathon, and that Marathon thereafter wrongfully appropriated this confidential information to its own benefit and to the detriment of the plaintiffs.
>
> * * *
>
> *In sum, Count I alleges that Marathon tortiously misappropriated business and trade information developed by the plaintiffs and given Marathon on a confidential basis to the plaintiffs' detriment. We hold that such a claim sounds in tort.*" (436 F.2d at 736. Emphasis Added.)

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[1] [The Amended Complaint is attached as Exhibit B to the Petition for Writ of Mandamus in the Court of Appeals (R-3, Ex. "B") and the Original Complaint is attached as Exhibit "1" to the Answer of Respondents Marathon and Lehman Brothers in the Court of Appeals. (R-7, Ex. "1")]

Course of Proceedings and Disposition in the Courts Below

A detailed statement of the procedural steps below may be found at pages 2 through 8 of the Petition for Writ of Mandamus (R-3), but a brief procedural summary at this point may be helpful to the Court in determining that granting Certiorari is not warranted.

The Amended Complaint (R-3, Ex. "B"), was filed on September 12, 1968, and Motions to Dismiss were filed by both defendants, (R-3, Ex. "D"). Because Plaintiff-Respondent Robert Martin is a prominent practicing lawyer appearing regularly in the Federal Courts of Kansas, the regular District Judges for Kansas asked the Tenth Circuit Court of Appeals to assign the case to an out of state judge, (R-3, p. 2). After additional discovery proceedings, filing of affidavits and stipulations, and following assignment of the case to two other judges, the case was eventually assigned to Respondent Judge Luther Bohanon and the Motions to Dismiss were heard by him on June 22 and 23, 1970, (R-3, p. 2). Judge Bohanon entered Orders overruling the Motions to Dismiss and requiring defendants Marathon and Lehman Brothers to file their Answers on or before July 8, 1970, (R-3, Ex. "E").

Demand for Jury Trial was filed by Petitioners on June 29, 1970, (R-3, Ex. "F"), which was prior to the filing of any responsive pleading or answer by any of the defendants below to either the Original Complaint or the Amended Complaint and therefore well within the time provided by Rule 38, Fed. R. Civ. P. Answers by defendants were there-

after filed on July 8, 1970, (R-3, Ex. "C").

On August 10, 1970, plaintiffs Bruce and Martin, in person and by counsel of record, and defendants Marathon and Lehman Brothers, by counsel, appeared before Respondent Judge in Wichita, Kansas, for a pre-trial conference. Judge Bohanon ruled that Plaintiffs would not be granted a jury trial on Count I, based on the Court's conclusion that Count I was purely equitable in nature, despite claims of counsel to the contrary (R-3, Ex. "K," pp. 3, 17). The Judge also delivered to counsel a suggested pretrial order covering Count I only prepared by the Respondent Judge with instructions that if the parties ". . . will not agree to the Court's suggested and determined procedure of the trial of the problem here, then the Court will hear you or make such rulings with reference to other matters in the case so that if either party elects to take an appeal, then all matters that the court rules on tomorrow should be presented to the appellate court . . ." (R-3, Ex. "K," pp. 19-20)

On August 11, 1970, the parties appeared before Respondent Judge as on the previous day, at which time he confirmed his ruling denying Plaintiffs a jury trial on Count I, refused to allow Plaintiffs to waive any claim for equitable relief under Count I and try only Count II (R-3, Ex. "K," pp. 48-49), and refused to allow Plaintiffs to amend Count I or even allow statement by counsel of the amendment he desired to make (R-3, Ex. "K," p. 50), contrary to Rules 15 and 16, Fed. R. Civ. P. At that time the Court also made numerous other rulings, collateral

to the central issue of denial of jury trial, but which would drastically affect the course of the proceedings if tried to the Court.[2]

On August 28, 1970, plaintiffs below filed their Petition for Writ of Mandamus and/or Prohibition and Motion to Stay Proceedings with the United States Court of Appeals for the Tenth Circuit, (R-3,4). The Court of Appeals stayed proceedings below, and set time for Answer and filing simultaneous briefs, by order entered September 3,

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[2] The Court made these related rulings and comments:

(1) Rescinded his prior order that the issue of liability would be tried first and ordered that all elements of Count I should be tried to the Court without a jury (R-3, Ex. "K," pp. 24-28), and stated as a reason the fact that plaintiffs had requested a jury trial, and therefore, the Court must change his position. (R-3, Ex. "K," pp. 50-59)

(2) Refused to allow plaintiffs' counsel to be fully heard with regard to objections to the Court's proposed pretrial order (R-3, Ex. "K," pp. 27, 29, 69, 71), and reprimanded counsel without justification when counsel attempted to state his objections. (R-3, Ex. "K," p. 27)

(3) Stated that the pretrial order would be drawn from the pleadings and not from the information developed or disclosed on discovery. (R-3, Ex. "K," pp. 25-26)

(4) Disclosed that he had already pre-judged one of the key issues in the case by deciding what plaintiff Martin understood by a certain letter (R-3, Ex. "K," p. 30), although he obviously had not yet read or heard Martin's testimony.

(5) Ruled that Count I and Count II were "two separate, distinct lawsuits." (R-3, Ex. "K," pp. 31, 40)

(6) Stated that the discovery problems imposed on plaintiffs by the Court's new rulings was of "little moment or problem," and refused to allow adequate time for discovery of the financial records of defendants, which were now needed if plaintiffs were to try Count I on both liability and damages as a separate and distinct lawsuit; and set the case for trial on September 14, 1970, without further consideration of plaintiffs' discovery problem. (R-3, Ex. "K," pp. 42-43)

1970, (R-6). The Petition for Writ of Mandamus in the Court of Appeals, sought relief from the Respondent trial Judge's rulings and orders by requesting:

"That Respondent Judge or his successor be directed to:

1) Grant petitioners a jury trial on all issues, or in the alternative direct that Count II be tried to a jury, prior to hearing on Count I, or in the alternative to allow Petitioners to withdraw any claim for equitable relief and try the issues set forth in Count II to a jury.

2) Set aside and vacate the pre-trial order entered on August 11, 1970, and grant a formal pre-trial hearing as contemplated by the Federal Rules of Civil Procedure.

That the Respondent Judge be prohibited from proceeding further in this case and that the Court assign a different Judge for further proceedings in the District Court." (R-3, p. 9)

It was in the context of such proceedings and record that the Court of Appeals held:

"The petition insofar as it relates to petitioner's right to trial by jury of Count I is therefore granted. The balance of the relief prayed for by petitioners, however, is denied and we perceive of no good purpose in detailing our reasons therefor, inasmuch as the central issue is petitioners' right to trial by jury of Count I. The stay heretofore ordered by this court is vacated, with further proceedings to be consonant with the views herein expressed." (436 F.2d at 737. But see correct printing of opinion at Appendix A-9 to Petition for Writ of Certiorari).

SUMMARY OF ARGUMENT

I. Contrary to the assertions of Petitioners, the underlying cause of action against defendants below is *not* purely equitable. Rather the action sounds in tort — a trespass upon property effectuated by misappropriation and use of a business or trade secret. The duty owned by defendants below arose out of their confidential and/or joint venture relationship to plaintiffs. While some equitable relief is requested in Count I, Count II prays for $10 million dollars damages against Petitioners and both counts are to the type traditionally triable to a jury. Under the prior decisions of this Court, where both legal and equitable claims are joined, plaintiffs are entitled to a jury trial on the underlying issues as a matter of right and such right cannot be impaired by requiring trial of equitable elements first.

II. All of the decisions of the various Courts of Appeals considering the question here presented are in complete harmony with one possible exception from the Fifth Circuit. However, that case was decided before this Court's latest decision on the same issue and therefore presents no actual conflict with the decision below.

III. Since the Circuit Court clearly followed the four recent case precedents of this Court, it cannot be said to have so departed from the accepted course of judicial proceedings as to justify exercise of this Court's supervisory powers. The policy consideration of congested court dockets urged by Petitioners is wholly inapplicable because of the uniqueness of the subject matter of this action. If supervisory control is to be exercised at all, it must be directed to the Respondent

District Judge because of his arbitrary and unwarranted denial of the constitutional right of jury trial.

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

I. THE QUESTION PRESENTED BY THIS CASE, WHEN CORRECTLY ANALYZED, HAS ALREADY BEEN DECIDED BY THIS COURT AND THE COURT OF APPEALS CORRECTLY FOLLOWED SUCH DECISIONS.

A. Analysis of the Amended Complaint discloses that the cause of action sounds in tort, with different relief sought in separate counts, and that the common issues to be tried are legal in nature and traditionally triable to a jury.

The Petition for Certiorari repeatedly characterizes the overall action as one sounding purely in equity and seeking to impress a constructive trust on the Japanese LNG sales contract. Obviously Petitioners prefer to so label the Amended Complaint in order to try to make it fit within the rationale of the authorities upon which they rely. However, the inapplicability of Petitioners' constructive trust label is demonstrated by the very authorities they cite and their own analysis of the Amended Complaint.

There is no claim made in the Amended Complaint that Marathon did not obtain legal title to the property involved in the Japanese LNG Contract and there is no claim made that Marathon holds its title or interest merely as a trustee. These are elements which the Petition for Certiorari at pp.

12-13 claims are need for a constructive trust. The Petition for Certiorari also stresses at p. 11 that the other parties to the Japanese LNG Contract were not made parties to the lawsuit and therefore the trial court, the Court of Appeals, and this Court could not have jurisdiction over them. In this regard it should be noted that Marathon originally alleged that Lehman Brothers were indispensable parties to this action (See Paragraph 5, Motion to Dismiss Original Complaint. R-3, Ex. "A"), but has not at any time claimed that any other parties should be joined, and that the Answers (R-3, Ex. "C") filed by Petitioners on July 8, 1970, do not raise any defense of improper parties. We can only conclude that Petitioners themselves, at least at that time, well understood that the Amended Complaint was based on the theory of business tort and did not seek to impress a constructive trust on a contract involving parties not joined in the lawsuit.

Finally, it should be noted that the Amended Complaint does not at any place aver a constructive trust, that the record discloses that counsel for Plaintiffs-Respondents have always contended in the Courts below that the basic action sounds in tort, that even the Respondent District Judge concluded that at least Count II was a common law money damage claim in the nature of a tort, and that the Court of Appeals concluded that the underlying action was in the nature of a business tort. Petitioners stand alone in their interpretation of the Amended Complaint.

Admittedly the Amended Complaint seeks some equitable relief in the nature of a declaratory judgment as to Marathon. But it is equally clear that relief traditionally

legal in nature by way of money damages is also sought against both Marathon and Lehman Brothers in Count II. The dual nature of the relief sought renders Petitioners' conclusionary allegations concerning the claims made in Count I irrelevant. ". . . Where equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims. The Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action." *Ross v. Bernhard,* 396 U.S. 531, 537, 538.

The "pre-merger custom with reference to" the nature of issues to be tried in an action of this type is correctly analyzed by Professor James. He notes that cases such as this are a part of that group of cases where there is a common issue, or set of issues, which is determinative of both forms of relief and which either law or equity would try under some circumstances. He suggests that the obvious solution is to let plaintiff express his choice of jury trial by simply claiming it in the way provided by the rules. *James, Right To A Jury Trial In Civil Actions,* 72 Yale L.J. 655, 675 (1963). (Cited in *Ross v. Bernhard,* 396 U.S. at 736, footnote 10.)

The common issues determinative of both forms of relief here are those factual elements creating the business tort of misappropriation of a trade secret. The *Restatement of Torts,* § 757 (1939) defines the elements:

"One who discloses or uses another's trade secret, without a privilege to do so, is liable to the other, if
a) he discovered the secret by improper means, or
b) his disclosure or use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him . . ."

The *Restatement* defines a trade secret to include:

"any . . . compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." (*Restatement of Torts* § 757, comment *b* (1939).)

Comment *b* to the *Restatement* further states the rule to be that even if information is not a trade secret, one who receives it in a confidential relationship can be under a duty not to use it and such abuse of confidence may be equally a basis for liability as to such information. The *Restatement* drafters state as an example of the breach of confidence covered by § 757 a fact pattern by which *A* discloses a trade secret to *B* for the purpose of enabling *B* to appraise its value with a view to a purchase or a joint venture. *B* is under a duty not to use the trade secret information adversely to *A*. *Restatement of Torts* § 757, Comment *j* (1939).

In short, any information which a person acquires in the area of a new business opportunity, which has been developed by the expenditure of time, effort and money, is in effect a trade secret which will be protected against abuse by proposed joint venturers. *E.g.* 9 *Cavitch, Business Organizations* § 232.02 [1][c] (1965). Obviously, the concept of a Japanese LNG project, with preliminary market analysis, economic surveys, privileged negotiating position and the like compiled by plaintiffs by expenditure

of time, effort and money, may be found by a jury to constitute a trade secret within the meaning of this rule.

The *Restatement* also expressly recognizes the pre-merger custom which allowed both legal and equitable relief for the tort of misappropriation of business secrets:

> "*Remedies.* One who has a right under the rule stated in this Section is entitled to a remedy or remedies appropriate under the circumstances. He may recover damages for past harm, or be granted an injunction against future harm by disclosure or adverse use, or be granted an accounting of the wrongdoer's profits, or have the physical things embodying the secret, such as designs, patterns and so forth, surrendered by the wrongdoer for destruction. Moreover, he may have two or more of these remedies in the same action if the court is competent to administer them. Defenses generally available in tort actions and actions for injunctive relief are also available here, insofar as they are applicable." (*Restatement of Torts,* § 757, comment *e.* (1939).)

Since the jurisdiction for this case is based on diversity of citizenship and arises out of transactions originating in Kansas, the substantive dimension of the claim asserted finds its source in state law, even though the characterization of that state-created claim as legal or equitable for purposes of whether a right to jury trial is indicated must be made by recourse to federal law. *Simler v. Conner,* 372 U.S. 221, 222. Kansas has long recognized the rights and duties arising out of a confidential or joint venture business relationship. *Ballard v. Claude Drilling Co.,* 149 Kan. 506, 88 P.2d 1021 (1939), and has expressly adopted and follows the *Restatement Rule* in regard to this business tort. *Mann v. Tatge Chem. Co., Inc.,* 201 Kan. 326, 440 P.2d 640 (1968).

Under the substantive law of Kansas, which finds its roots in the common law of torts and represents the pre-merger custom applicable here, the elements sufficient to create the underlying cause of action are well defined:

> "In an action such as this, essentially Plaintiff must establish (1) a confidential relationship between the parties; (2) disclosures by plaintiff to defendant of what amounts to a trade secret, and (3) a use of those disclosures by defendant. (Vol. 4 Restatement of the Law of Torts, § 757; *Speedry Chemical Products, Inc. v. Carter's Ink Company,* 306 F.2d 328 [2nd Cir. 1962]; *Heyman v.* AR. Winarick, Inc., 325 F.2d 584 [2nd Cir. 1963], 9 A.L.R. 3d pp. 652, 666.)" (*Id* at 332.)

Applying the three elements of the cause of action as defined by the Kansas court, it is obvious that the Amended Complaint contains ample allegations to fairly state a claim for relief which sounds in tort and is of the type traditionally triable to a jury:

(1) *"A Confidential Relationship Between the Parties;"*
See Amended Complaint Paragraphs Fifth, Sixth, Eighth, Ninth, Eleventh and Thirteenth of Count I, Paragraph Second of Count II, and Exhibits A and C thereto. (R-3, Ex. "B")

(2) *"Disclosure by Plaintiff to Defendant of What Amounts to a Trade Secret;"*
See Amended Complaint Paragraphs Fourth, Fifth, Sixth, Thirteenth and Exhibits A and C thereto. (R-3, Ex. "B")

(3) *"A Use of Those Disclosures by Defendant;"*
See Amended Complaint Paragraphs Seventh, Ninth, Tenth, Twelfth, Thirteenth, and Paragraph Second of Count II. (R-3, Ex. "B")

The Kansas cases are hardly unique, but rather are simply reflective of the substantive law prevailing in most jurisdictions which also follow the common law rule in cases

of this type. For example, see *Granik v. Perry,* 418 F.2d 832 (5th Cir. 1969); *Water Services, Inc. v. Tesco Chemicals, Inc.,* 410 F.2d 163 (5th Cir. 1969); *W. R. Grace & Co. v. Hargadine,* 392 F.2d 9 (6th Cir. 1968); *Copley v. Northwestern Mutual Life Ins. Co.,* 295 F. Supp. 93 (S.D.W. Va. 1968); *Atlantic Wool Combing Co. v. Norfolk Mills, Inc.,* 357 F.2d 866 (1st Cir. 1966); *Imperial Chem. Indus. Ltd. v. National Distillers & Chem. Corp.* 342 F. 2d 737 (2nd Cir. 1965); *Heyman v. A. R. Winarick, Inc.,* 325 F.2d 584 (2nd Cir. 1963); *International Industries, v. Warren Petroleum Co.,* 248 F.2d 696 (3rd Cir. 1957), *cert. dismissed by stipulation,* 355 U.S. 943; *Colgate-Palmolive Co. v. Carter Products, Inc.,* 230 F. 2d 855 (4th Cir. 1956), *cert. den.* 352 U.S. 843, *reh. den.* 352 U.S. 913; *Seismograph Service Corp. v. Offshore Raydist, Inc.,* 135 F. Supp. 342 (E.D.La. 1955), *aff'd. with order to award attorney fees on remand,* 263 F.2d 5 (5th Cir. 1958); *Franke v. Wiltschek,* 209 F.2d 493 (2nd Cir. 1953); *Smith v. Dravo,* 203 F.2d 369 (7th Cir. 1953); and *Hoeltke v. C. M. Kemp Mfg., Co.,* 80 F.2d 912 (4th Cir. 1936), *cert. den.* 298 U.S. 673, 80 L.Ed. 1395.

Judge Wright succinctly stated the tort law rationale supporting claims for relief such as that involved at bar, when he stated:

> "*The robber baron morality of another day is no longer acceptable.* Courts are insisting on increasingly higher standards of commercial integrity. [citing cases] . . . The fact that the business information is otherwise available is no defense. The improper acquisition itself creates the liability in damages . . . . *Even where it cannot be said*

> *that the parties stand in confidential relations, improper acquisition of another's business information or trade secrets subjects the perpetrator to liability in damages.* Restatement of the Law of Torts, § § 757, 759." (*Seismograph Serv. Corp. v. Offshore Raydist, Inc.*, 135 F. Supp. 342, 354 (E.D. La. 1955), *aff'd with an order to award attorney fees on remand*, 263 F.2d 5 (5th Cir. 1959. Emphasis added.)

A correct analysis of the dual nature of a cause of action, identical to the one at bar, was made in *Harkobusic v. General American Transportation Corp.*, 209 F. Supp. 128 (W. D. Penn. 1962). The Court there concluded that even though equitable relief was also sought, the action was triable to a jury:

> "The complaint alleges that defendant breached a confidential relationship between it and plaintiff and pirated his invention. *These allegations disclose a tort action, over which there is concurrent jurisdiction at law and in equity.* In addition, the complaint alleges that defendant expressly promised to hold plaintiff's secret in strictest confidence, which promise it broke. These allegations disclose a contractual issue in connection with the alleged breach of a confidential relationship. Compensatory and exemplary damages as well as injunctive relief are sought.
>
> "*In my opinion a suit for breach of a confidential relationship involving a trade secret or invention,* and for breach of an express promise not to disclose, while it may be brought in equity and usually is, *may also be pursued at law and tried to a jury because it sounds in tort as well as assumpsit.* Tort Actions and contract actions are generally triable by a jury as a matter of right. *Dairy Queen v. Wood*, 369 U.S. 469, 479, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962); *Beacon Theatres v. Westover*, 359 U.S. 500, 510, 79 S.Ct. 948, 3 L.Ed. 2d 988 (1959); 50 C.J.S. Juries § § 16b, 19." (209 F. Supp. at 129. Emphasis added.)

"Whatever the rationale, the tort in question is the same — trespass upon property effectuated by misappropriation, disclosure or use." (2 *Callmann, Unfair Competition, Trademarks, and Monopolies,* § 51, p. 346 (3rd Ed. 1968).)

B. Joinder Of Legal And Equitable Claims For Relief Cannot Impair The Right To Jury Trial And This Court Has Required That The Jury Trial Be Granted First.

The principle that the right to a jury trial is not waived, nor in any manner impaired, by joinder of claims for relief which may be denominated as "equitable," has long been established. *Moore, Federal Practice,* ¶ 38.13 (2nd Edition).

The Petition for Certiorari incorrectly asserts that this action sounds *purely* in equity and ignores the obvious dual nature of Count I. Assuming *Arguendo* that Petitioners are correct as to Count I, it clearly cannot be so claimed as to Count II. Respondents here advised both Courts below that they were willing to withdraw or abandon Count I entirely and proceed to trial on Count II if such be necessary in order to secure their right to jury trial. The Respondent District Judge refused to consider or allow such request of waiver or amendment, (R-3, pp. 6-7; Ex. "K," pp. 48-50).

No valid reason has ever been advanced by Petitioners why Respondents should not at least be allowed to proceed to jury trial on Count II only. Apparently Petitioners as well as Respondent District Judge have always recognized

that Count II is clearly a law claim triable to a jury. (See R-3, Ex. "K"). In order to have one full and fair trial on all underlying issues it is obvious that either Count II must be tried first or both counts must be tried together. Since Count II incorporates by reference all allegations of Count I there was no sound reason in law or fact for Respondent Judge to deny Respondents request to waive or withdraw Count I and proceed to jury trial on Count II only.

The very recent opinion of this Court in *Ross v. Bernhard,* 396 U.S. 531, conclusively demonstrates the policy enunciated in recent years that where "legal" and "equitable" claims are joined, the parties still have a constitutional right to a jury trial. There a derivative suit was brought against the directors of the Lehman Corporation, and Lehman Brothers (the same partnership that is Petitioner-Defendant in this action). It was alleged that Lehman Brothers controlled the corporation through an illegally large representation on the board of directors and the directors were charged with converting corporate assets, gross abuse of trust, misconduct, misfeasance, bad faith, and gross negligence. Both the individual defendants and Lehman Brothers were accused of breaches of fiduciary duty. For relief, petitioners requested an accounting by defendants to the corporation, and demanded a jury trial. (*Id.* at 732.)

In an interlocutory appeal from the trial court ruling on a motion to strike the demand for jury trial, the Court of Appeals reversed and held that a stockholders' derivative action was entirely equitable in nature and that no part of the action was triable to a jury. This Court reversed, holding

that the right to jury trial attaches to those issues in derivative actions as to which the corporation, had it brought the suit, would have been entitled to a jury. (*Id.* at 733.) The express holding of the Court should fully resolve the questions raised in this case:

> "In the instant case we have no doubt that the corporation's claim is, at least in part, a legal one. The relief sought is money damages. There are allegations in the complaint of a breach of fiduciary duty, but there are also allegations of ordinary breach of contract and gross negligence. The corporation, had it sued on its own behalf, would have been entitled to a jury's determination, at a minimum, of its damages against its broker under the brokerage contract and of its rights against its own directors because of their negligence. Under these circumstances it is unnecessary to decide whether the corporation's other claims are also properly triable to a jury. *Dairy Queen v. Wood*, 369 U.S. 469, 8 L.Ed. 2d 44, 82 S. Ct. 894 (1962). The decision of the Court of Appeals is reversed." (*Id.* at 738.)

The decision of the Tenth Circuit in this case is also in harmony with the rationale of this Court in *Beacon Theatres v. Westover*, 359 U.S. 500. There plaintiff had instituted a declaratory judgment action to determine that certain exclusive clearances were reasonable and not in violation of the anti-trust laws; plaintiff also asked for a temporary injunction to prevent the defendant from bringing an anti-trust suit. The defendant counterclaimed for damages against plaintiff, cross-claimed against a distributor who had intervened, and demanded a jury trial. The District Court rejected defendant's demand for jury trial, deeming the issues to be "essentially equitable," and directed that those issues be tried to the Court before the validity of the

charges of anti-trust violations was submitted to the jury. The Court of Appeals denied defendant's petition for a writ of mandamus directing the District Judge to vacate this order. (*Id.* at 503).

In both *Beacon Theatres* and the present case, the same set of alleged facts gave rise to both legal and equitable claims. In both, a timely demand for trial by jury was filed, and the party seeking its right to trial by jury filed a petition for mandamus to correct the trial court's denial of that right. The distinction that in *Beacon Theatres* plaintiff sought a declaratory judgment and injunction, and that the defendant was seeking jury trial on his counterclaim and cross-claim, whereas in the present case Petitioners sought a declaration of interest and an accounting under Count I and damages under Count II and are seeking jury trial on their complaint should make no difference in the applicability of its rule here in view of this Court's holding that the form of the action did not affect defendant's right to jury trial (*Id.* at 504). This view is borne out by the many later Circuit Court decisions, *infra,* applying *Beacon Theatres* to cases in which plaintiffs joined legal and equitable claims in their complaints. This Court expressly rejected denial of a party's right to jury trial by the procedural device of trying the equitable issues first, thus rendering the facts underlying the legal claim res judicata (*Id.* at 507).

This Court reiterated and expanded its *Beacon Theatres* holding in *Dairy Queen, Inc. v. Wood,* 369 U.S. 469, and again established principles equally applicable here. There, the complaint alleged breach of a written trademark licensing agreement; plaintiff's cancellation of the contract for

breach thereof; and trademark infringement caused by defendant's continuing business after cancellation of the agreement. The prayer was for temporary and permanent injunctions and an accounting. The answer alleged laches and estoppel, antitrust violations by the plaintiff in regard to the trademark, and denied breach of the agreement. The defendant demanded trial by jury which the District Court denied on the grounds that the action was either "purely equitable" or, if not purely equitable, that any legal issues were merely "incidental" to the equitable issues. (*Id.* at 470).

Addressing specifically the question here presented, this Court said:

> "Nonetheless, after the adoption of the Federal Rules, attempts were made indirectly to undercut that right [to jury trial] by having federal courts in which cases involving both legal and equitable claims were filed decide the equitable claim first. The result of this procedure in those cases in which it was followed was that any issue common to both the legal and equitable claims was finally determined by the court and the party seeking trial by jury on the legal claim was deprived of that right as to these common issues. This procedure finally came before us in [*Beacon Theatres*] . . .
>
> "Our decision reversing that case not only emphasizes the responsibility of the Federal Courts of Appeals to grant mandamus where necessary to protect the constitutional right to trial by jury but also limits the issues open for determination here by defining the protection to which that right is entitled in cases involving both legal and equitable claims. The holding in *Beacon Theatres* was that where both legal and equitable issues are presented in a single case, 'only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now antici-

> pate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.' [Footnote omitted.] That holding, of course, applies whether the trial judge chooses to characterize the legal issues presented as 'incidental' to equitable issues or not. [Footnote omitted.]" (*Id.* at 472, 473)

Petitioners also suggest on the one hand that the decision of the Court of Appeals conflicts with *Simler v. Conner,* 372 U.S. 221, but on the other hand assert that it, like *Ross, Dairy Queen,* and *Beacon Theatres,* is distinguishable on its facts. Granted the difference in the facts of all these cases, we fail to see any reason why the constitutional principles enumerated are not fully applicable here.

In *Simler,* this Court expressed the unanimous view that the right to a jury trial in diversity cases is to be determined by federal law. In determining the basic question of whether the cause of action was legal in nature, the Court said:

> "The case was in its basic character a suit to determine and adjudicate the amount of fees owing to a lawyer by a client under a contingent fee retainer contract, a traditionally 'legal' action. (Cites omitted) The fact that the action is in form a declaratory judgment case should not obscure the essentially legal nature of the action. The questions involved are traditional common law issues which can be and should have been submitted to a jury under appropriate instructions as petitioner requested." (372 U.S. at 223)

We submit that if the lawsuit here must be given a label at all, it obviously is in the form of a declaratory judgment seeking adjudication of plaintiffs' interest in the LNG project by reason of the tortious misappropriation of business secrets, seeking an accounting of the profits derived therefrom by Marathon, and seeking damages as a result

thereof from both Marathon and Lehman Brothers. However, in the words of *Simler,* the form of the claim should not obscure the essential legal nature of the action and the questions of fact involved are traditional common law issues which can and should be submitted to a jury. Certainly such is indisputably the nature of Count II.

Respondents-Plaintiffs efforts to withdraw any claims for equitable relief in Count I and to proceed to trial by jury only on the legal claims clearly stated in Count II were arbitrarily and unjustifiably refused by the Respondent Judge. Petitioners here have not shown that they will suffer any harm if the legal issues are tried first to a jury, and the Respondent Judge cited no "imperative circumstance" in support of his ruling. Consequently, we submit that, on the basis of this Court's recent decisions in *Beacon Theatres, Dairy Queen, Simler,* and *Ross,* a writ of mandamus was not only proper, but was required, in order to protect Respondents' timely demand for trial by jury. Once the underlying factual issues are determined by the jury, all appropriate relief, whether legal or equitable, can then be granted by the Court or jury or both.

Finally, Petitioners assert that the practical abilities and limitations of juries are such that no court on earth, could instruct them on the complexities of this case recited by the District Judge; and that the comments of the District Judge in this regard amount to conclusive findings. In the first place, contrary to the assertion of Petitioners at p. 16, the depositions taken in the case below were ***not properly*** before the District Judge. To the contrary, one of the points

raised in the Court of Appeals was the fact that the trial court improperly considered matters *not* in evidence and *not* contained in the pleadings. (See R-3 at p.5, para. b, and pp. 6-7, para. e (2) and (5).) Furthermore, the supposed complexities stated need not unduly burden the jury. The principal issues to be decided at trial are the elements of the tort involved and turn on the credibility of witnesses, which a jury is uniquely qualified to resolve:

(1) Was there a confidential relationship between the parties?

(2) Was there a disclosure by plaintiffs to Marathon of what amounts to a trade secret?

(3) Was there a use by Marathon of those disclosures?

(4) Did Lehman Brothers conspire with and assist Marathon in such misappropriation of business secrets in violation of its duty to plaintiffs?

(5) What damages or interest should be awarded to plaintiffs if the jury finds in their favor on the foregoing issues?

If the Court orders an accounting on the basis of the jury's findings in favor of plaintiffs on issues (1) through (4), then Marathon may take into consideration any factors it deems proper (including those listed in footnote 11 of the Petition for Certiorari) in rendering its accounting and disclosure of all profits obtained. Plaintiffs would have the right to take exception to the elements used in the accounting, and they could produce evidence to show why such elements are not proper. The jury may then take into consideration any such conflicts over the accounting in awarding damages to plaintiffs.

Even if the jury must consider all of the financial factors listed, it still would not be any more difficult or complex a case for a jury to decide than hundreds of others involving oil and gas interests and legal accounting in various business tort suits. A jury under proper instructions from the Court, could readily calculate the damages flowing from this alleged misappropriation of business secrets, just as courts of law often do in copyright, patent, and trademark infringement cases. *Dairy Queen v. Wood,* 369 U.S. 469, 480, 481. Petitioners argument in this regard really just displays a lack of confidence in the jury system — a view that was not shared by the framers of the Constitution and a view that is out of harmony with this Court's decisions in the cases just discussed.

II. THE DECISION OF THE TENTH CIRCUIT DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS CONCERNED WITH SIMILAR CLAIMS.

On several prior occasions, the Tenth Circuit Court of Appeals has been confronted with the same question raised at bar. The first case of *Meeker v. Ambassador Oil Co.,* 308 F.2d 875 (10th Cir. 1962), *reversed per curiam* at 375 U.S. 160, under authority of *Beacon Theatres* and *Dairy Queen,* presented the identical problem of legal and equitable claims joined in the same pleading. In *Meeker* the plaintiffs' second amended complaint set up two claims, the first was for an adjudication that plaintiffs were the owners of certain mineral interests and that the defendant

oil company should account for money received from production, and the second sought damages for slander of title. Meekers demanded a jury trial on both claims. The Tenth Circuit concluded that Meekers' first claim was a suit in equity and that plaintiffs were therefore *not* entitled to a jury trial on such claim (*Id.* at 878, 882, 883); and that the second claim would have been triable to a jury, but that since the trial court, in the exercise of its equitable jurisdiction, had determined that the lease had expired, the Meekers no longer had any title to be slandered and there was nothing left to be tried on the second claim. (*Id.* at 884). However, this Court's per curiam reversal obviously meant that the first claim, even if equitable in nature, could not be tried first and thereby preclude the right to jury trial raised by the second claim. What Respondent Judge Bohanon proposed to do in this case would create precisely the same problem raised in *Meeker,* namely, if Count I is tried to the Court first and the Judge determines plaintiffs have no interest in the Japanese LNG project there will be nothing left to try on Count II.

In *A.M.F. Tuboscope, Inc. v. Cunningham,* 352 F.2d 150 (1965), the Tenth Circuit was presented with a patent infringement suit in which the plaintiff prayed for an injunction against further infringement, an accounting, and treble damages, thus joining requests for relief traditionally viewed as both equitable and legal in nature. Defendant denied the validity of the patent and its infringement, and counterclaimed for a declaratory judgment of invalidity and non-infringement and for damages resulting from plaintiff's allegation. Reversing the trial court's denial of

a jury trial on all issues, the Tenth Circuit this time followed *Beacon Theatres* and *Dairy Queen.*

More recently, the Tenth Circuit had the question of right to jury trial before it on appeal from a decision by Respondent Judge Bohanon. In *King v. United Benefit Fire Ins. Co.,* 377 F.2d 728 (1967), *cert. den.* 389 U.S. 857, Judge Bohanon denied a jury trial on the same grounds he applied in the case at bar, that the action was for an accounting and therefore equitable in nature. The Tenth Circuit expressly found that the denial of jury trial was erroneous, in view of the opinions in *Beacon Theatres, Dairy Queen,* and *A.M.F. Tuboscope, supra.* However, since only questions of law remained on uncontroverted facts, the Court deemed Judge Bohanon's error harmless in that particular case.

Decisions from a number of other Circuits also clearly establish that plaintiffs, in postures similar to Respondents here, are entitled to trial by jury on all issues, even though legal and equitable relief is joined in the complaint. Such cases demonstrate that the various Circuits interpret *Beacon Theatres* and *Dairy Queen* precisely as has the Tenth Circuit. For example, in a stockholders' derivative action, the Ninth Circuit found that:

> ". . . [E]xcept under most imperative circumstances, a right to a jury trial on legal issues may not now be denied to a federal litigant on the ground that the case reached court only through equity, or because equitable rights are involved, or because the legal issues are 'incidental' to the equitable issues, or because substantive equitable remedies are sought, or by the device of trying the equitable issues first." [All footnotes omitted.] (*DePinto v. Provident Sec. Life Ins. Co.,* 323 F.2d 826, 835 (1963),

cert. den. Garsuch v. DePinto, 376 U.S. 950, and *Duhame v. Provident Sec. Life Ins. Co.,* 376 U.S. 950, and *DePinto v. Provident Sec. Life Ins. Co.,* 376 U.S. 950, rehearing denied, 383 U.S. 973.)

In the Fourth Circuit, a plaintiff union member sought the equitable relief of restoration to union membership, after having been suspended, and also sought damages for that suspension. The district judge granted a jury trial on the damage issue and was affirmed by the Fourth Circuit, holding:

"Where issues underlying equitable and legal causes of action have been exactly the same, the Supreme Court has been careful to preserve a litigant's right to jury trial on the factual issues, even where a stronger basis was presented for equitable than for legal relief." [Citing *Dairy Queen* and *Thermostitch.*] (*Simmons v. Avisco, Local 713, Textile Workers Union,* 350 F.2d 1012, 1018 (1965).)

In the Third Circuit, both monetary and injunctive relief were sought by plaintiff in a patent infringement action. The trial court refused plaintiff's jury demand and the Circuit Court reversed, under authority of *Beacon Theatres* and *Dairy Queen,* holding:

"As a result of the decisions, the doctrine that an action which seeks both damages and equitable relief is predominately equitable and therefore may not be tried by a jury has been reversed." (*Kennedy v. Lakso Co.,* 414 F.2d 1249, 1252 (1969) Emphasis added.)

In *Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp.,* 294 F.2d 486, 491 (1961), the Fifth Circuit held:

"It is therefore immaterial that the case at bar contains a stronger basis for equitable relief than was present in

> Beacon Theatres. It would make no difference if the equitable cause clearly outweighed the legal cause so that the basic issue of the case taken as a whole is equitable. *As long as any legal cause is involved the jury rights it creates control.* This is the teaching of Beacon Theatres, as we construe it." (294 F.2d at 491. Emphasis added.)

See also *Swofford v. B & W Inc.,* 336 F.2d 406 (5th Cir. 1964), *cert. den.,* 379 U.S. 962.

Almost squarely in point with the case at bar is *Robine v. Ryan,* 310 F.2d 797 (2nd Cir. 1962). That case was before the Second Circuit on a petition for mandamus to set aside the district judge's order striking plaintiff's demand for a jury trial. The plaintiffs alleged that: they had invented a machine which they were induced to disclose to defendants during the course of business negotiations, it being understood that the information disclosed would not be used by the defendants or revealed to others without plaintiff's consent; and that the defendants wrongfully appropriated that invention to their own use in breach of the confidential relationship established by the negotiations. The plaintiffs sought damages for $100,000 and an injunction against future infringements, damages for their loss, and an accounting of profits arising from defendants' infringements. The Court of Appeals held that the trial judge was in error in denying the plaintiffs' right to jury trial on Count I:

> "We agree with the district judge that the most significant portion of the relief sought is probably contained in the action on the patent. It is also true that the plaintiffs could have sought complete compensation for their injury within the framework of patent infringement. But we think it is clear that they did not do so . . .

> Some of the facts alleged, while essential to the former claim, are irrelevant to a claim for patent infringement; taking the claims as stated, it is conceivable that the plaintiffs would recover on one of them and not the other . . .
>
> "While the pleading of the first cause of action includes phrases ordinarily accompanying a request for injunctive relief, the plaintiffs do not actually request it. *They do make a claim for damages, and we are satisfied that this is the relief which they seek on this cause of action. Therefore, they are entitled to a jury trial on that portion of their complaint. Such trial must precede a trial of any equitable issues which remain.*" [Citing *Dairy Queen* and *Beacon Theatres.*] (*Id.* at 798. Emphasis added.)

Despite the harmony of all the Circuit Court decisions just discussed, including those from the Fifth Circuit, Petitioners seize upon the one case of *Local No. 92 International Ass'n. S. & C. I. W. V. S. v. Norris,* 383 F.2d 735 (5th Cir. 1967), and claim that because of it there is a conflict among the Circuits.

It should be noted that the *Norris* case was decided three years *before* this Court's decision in *Ross v. Bernhard,* 396 U.S. 531, and in view of the *Ross* decision we believe the viability of the *Norris* decision is extremely doubtful. However, *Norris* is distinguishable on the particular facts there involved. The *Norris* case was a derivative suit brought by four individual union members charging certain local union officials with breach of fiduciary duties. The District Court for the Northern District of Alabama found for the plaintiffs. The Court of Appeals affirmed, finding that the evidence sustained a finding that a local union official had flagrantly abused his power in breach of trust

and that the union was liable therefor. The complaint contained a general prayer for relief and sought an accounting, the appointment of a special administrator, an injunction prohibiting defendants from further wrongful acts, and an award of attorney's fees out of any recovery. The union official appealed, partially on the grounds that he was erroneously denied trial by jury. The court distinguished the case of *Simmons v. Avisco, Local 713, Textile Workers Union of America,* 350 F.2d 1012 (4th Cir. 1965) on the basis that the nature of the *relief sought in Simmons was clearly within the realm of common law tort, whereas in the Norris case:*

> ". . . [T]he relief sought is, not only in name but in substance, traditionally equitable. *The members of the Local seek to compel an accounting, the end result of which would be to restore to the Local's treasury any funds found to have been misappropriated by the officials of the Local in violation of the fiduciary responsibilities imposed upon them by the Act,* and perhaps more important, to rid the Local of such pernicious infections for the future. These issues are traditionally for the decision of the Chancellor, and no mandatory right to a jury exists." (*Id.* at 740. Emphasis added.)

If the *Norris* case has any validity at all after *Ross v. Bernhard, supra,* it is on the narrow basis of the emphasized portion of the above holdings. The relief sought was for payment of money into a fund and not for payments immediately and unconditionally to the beneficiaries of the trust. In effect, it was to redress a breach of trust by refunding to the trust estate. Such a proceeding might properly be called purely equitable and was not even actionable under the common law forms of action. See *Nedd v. Thomas,* 316

F. Supp. 74, (M.D. Penn. 1970); *Restatement of Trusts,* Second, § 197, Comment b. (1959).

III. THE COURT OF APPEALS HAS NOT SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO NECESSITATE OR JUSTIFY EXERCISE OF THIS COURT'S SUPERVISORY POWER.

Petitioners argument that the Court of Appeals has radically departed from the accepted and usual course of judicial proceedings is totally without merit. The Court below clearly followed four major decisions of this Court dealing with the same issue, and applied the same interpretation to those cases that has been adopted in at least seven other decisions from five different Circuits. In issuing the extraordinary writ of mandamus it used the same procedural mechanism utilized by this very Court in similar cases, and acted in compliance with this Court's directive to the Circuits that they had "the responsibility . . . to grant mandamus where necessary to protect the constitutional right to trial by jury . . ." (*Dairy Queen v. Wood,* 369 U.S. 469, 472.)

With regard to the so-called policy consideration of congested calendars and unprecedented backlog of cases we can only agree that such conditions are deplorable and that urgent reforms are needed. However, we know of no proliferation of lawsuits similar to this one which could possibly be contributing to the problem. The cause of action here stated and the remedies sought are completely unique and

any decision in this case will have little or no impact on anyone other than the Courts below and the parties involved. Petitioners' argument might have had greater merit if made in *Beacon Theatres* (anti-trust claim), or *Dairy Queen* (trademark infringement), or *Ross* (derivative stockholders suit), for all involved fairly common types of civil actions. Yet this Court wisely recognized that valued constitutional rights must not depend upon potential increase in jury case backlog—whatever its cause. If we were ever to accept such a fallacious premise then the constitutional rights of those charged with crime would be among the first to be eroded, for surely it is well documented that criminal cases greatly contribute to current court congestion.

Finally, we should remember that Petitioners' whole argument is based on the premise that this lawsuit involves only Count I and that Count I is purely equitable—we have shown that neither assumption is valid. We do not ask that the right of jury trial be enlarged. We only ask that it be upheld in accordance with the prior recent decisions of this Court. If the right exists at all under the Constitution, there can be no policy consideration important enough to restrict it.

Petitioners' argument requesting exercise of this Court's supervisory powers is also misplaced because it is the District Court, not the Court of Appeals, that "has so far departed from the accepted and usual course of judicial proceedings as to plainly call for the corrective exercise of [the appellate court's] power of supervision." It was because of the need for corrective supervision of the District Court that

the Petition for Writ of Mandamus was filed.[3] Respondents-Plaintiffs specifically asked the Court of Appeals to either grant a jury trial on all issues, or direct that Count II be tried first, or allow plaintiffs to "withdraw any claim for equitable relief and try the issues set forth in Count II to a jury." (R-2 p. 9, para. C.)

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[3] The record contains the following colloquy between Respondent Judge and counsel for Plaintiffs at the pre-trial conference on August 11, 1970. (R-3, Ex. "K," pp. 48-50):

"[MR. HOWARD] At this time, and purely because of your Honor's ruling with regard to a jury trial on Count I, we are hereby prepared to waive right to proceed to trial on Count I at this time, and ask the Court to allow us to proceed to trial on Count II as to both sets of defendants on all issues in the case, and we ask to try that to a jury and then we will waive —

"THE COURT: (Interposing) Again, the Court says no. The Court is not going to let you say how the Court is going to try this case. I am going to try this case exactly like I told you in the pretrial order.

"MR. HOWARD: Your Honor —

"THE COURT: If that isn't plain to you, I don't know why. If you don't like what the Court does, why then I can't help you. You are not telling this Court we are going to try Count II first. We are not.

"MR. HOWARD: What we are saying is, we are willing, in view of your Honor's ruling, to waive our equitable claim for an accounting and proceed to trial as to both sets of defendants, on all issues.

"THE COURT: You may be willing, but it's not the way the Court is going to try the case. That's all there is to it. If that's all you have to ask, why then I am through. Get ready for trial.

"MR. HOWARD: Your Honor, I point out to you that because of the nature of the conspiracy charges against the two sets of defendants, the trying of the case in two separate stages leads to some serious problems of proof with regard to the admissibility of evidence, that would be admissible with both parties

"THE COURT: We will take care of that when the time comes. We will proceed to try Count I. Why, then, whatever those problems are, the Court meets them at that time.

"MR. HOWARD: Is it you Honor's —

"THE COURT: This case is set for trial. You are directed to get ready. It's your lawsuit. It has been a-burning for more than ten years. Why could this Court justify any other procedure? It's been on this docket

The arbitrary manner in which the Respondent District Judge denied plaintiffs attempt waiver and/or dismissal of Count I, or amendment to exclude any equitable claim, clearly demonstrates why the writ of mandamus had to be issued in this case. There simply was and is no other way to protect plaintiffs' constitutional rights and to insure a fair and impartial trial to a jury.

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for three years. It's your lawsuit. Get ready if you want to try it. If you don't why then the Court will take such action as is proper.

"MR. HOWARD: Your Honor, I didn't say that I wouldn't be ready to go to trial on September 14.

"THE COURT: That's all we are talking about.

"MR. HOWARD: Frankly, and I am not trying to be obtuse, but I frankly do not understand, and that is, if we are willing to waive our right to proceed to trial on Count I, why it is that we cannot try Count II on September 14.

"THE COURT: Because that's not the way the Court is going to handle this problem.

"MR. HOWARD: But I don't understand. I'm not trying to be stupid or to embarrass your Honor —

"THE COURT: You are not embarrassing me in the least, not in the least.

"MR. HOWARD: I guess I am impatient with myself for showing my ignorance, but I don't understand why we can't go to trial as to both defendants September 14th.

"THE COURT: I am not going to try it that way. Now I have told you that four or five times. Do I have to tell you any more?

"We are going to try the first count first. Just as you said in the complaint and in your prayer, if you lose on the first count, then you want to be heard on the second.

"MR. HOWARD: That's what we plan amending the —

"THE COURT: (Interposing) You are not amending anything.

"MR. HOWARD: Waive that right.

"THE COURT: You are not amending anything in this court. This case is so old we are going to proceed just the way you patterned it when you started it."

CONCLUSION

The four prior decisions of this Court dealing with the question here presented establish ample guidelines for the lower federal courts. The decision below and decisions from other circuits are all in harmony with that precedent. While this case involves substantial rights and monetary claims arising out of tortious misappropriation of a business secret, it is unique on its facts and any decision rendered by this court prior to any final judgment would not add to the precedents already established. The spirit of Supreme Court Rule 20 should be applied since Petitioners have made no showing that the case is of such imperative public importance as to justify deviation from normal appellate processes. Any review by this Court should await a judgment on the merits after trial of the underlying issues to a jury, and certiorari therefore should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 1586

MARATHON OIL COMPANY, a corporation; and ROBERT LEHMAN, et al, d/b/a LEHMAN BROTHERS, *Petitioners*

v.

GEORGE H. BRUCE; ROBERT MARTIN; and HON. LUTHER BOHANON, United States District Judge, *Respondents*

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY MEMORANDUM OF PETITIONERS

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REPLY MEMORANDUM OF PETITIONERS

This short reply will be confined to the new question posed in respondents' opposition brief at p. 2, and to answering the argument that respondents should have been allowed to try Count II to a jury before trying Count I to the Court, or should at least have been granted leave

to file an amended complaint withdrawing Count I and repleading Count II. Both of these contentions were decided against respondents by the District Court and the Court of Appeals. They presuppose a decision of this Court that Count I is equitable and triable by the Court without a jury. To that extent they are a confession that the Court of Appeals erred in holding that Count I states a claim at law and not in equity.

I.

The single question raised in our petition for certiorari is whether the Court of Appeals correctly held that Count I should also be tried to a jury where the only relief sought in Count I is a decree determining whether respondents have "equitable rights" to participate in a Japanese contract between other parties, and if so, the "precise nature and extent" of their equitable rights, followed by an accounting. No question is here raised nor was a question presented in the Court of Appeals as to the correctness of the holding of the District Court that Count II is triable to a jury. Therefore, the issue is not whether plaintiffs below were deprived of their constitutional right to a jury trial, but whether that right also includes the right to try an equitable claim to a jury.

The writ of mandamus was granted by the Court of Appeals only "insofar as it relates to petitioners' [Bruce and Martin] right to trial by jury of Count I." As to all other issues raised in the mandamus petition, including the new question posed in the opposing brief of respondents herein, the Court of Appeals said: "The balance of the relief prayed for by petitioners, however, is denied and we perceive of no good purpose in detailing our reasons therefor, inasmuch as the central issue is peti-

tioners' right to trial by jury of Count I." (Opinion, Appdx. A-9.) Consequently if, as the District Court held, and as we contend, Count I is not triable to a jury, then the Court of Appeals has necessarily held that the District Court did not err in ordering Count I tried first, nor did it err in denying plaintiffs (respondents herein) leave to amend a second time even though they proposed to withdraw Count I and replead their claim asserted in Count II.

II.

Respondents' argument neither supports the decree and opinion of the Court of Appeals nor the orders of the District Court. Consequently, it does not come within the rule announced in *Dandridge v. Williams,* 397 U.S. 471, 475, that the prevailing party may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matters overlooked or ignored by it. Obviously the argument which was rejected by the Court of Appeals does not support its opinion and decree that Count I is triable to a jury. On the contrary, the contention is made on the theory that should Count I be an equitable claim, then the Court of Appeals should have granted respondents some of the additional relief prayed for in their mandamus petition. That contention though cannot be made here because no cross-petition has been filed. *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375.

III.

However, even if the contention could be considered by this Court, it is not grounds for denying the petition

for certiorari. The District Court, in announcing that Count I would be tried first, was simply following the order in which the plaintiffs had pleaded their claims. They prayed in Count II (R-3, Ex. "B", pp. 18-19) as follows: "Wherefore, in the alternative, in the event the Court does not grant the *equitable relief* prayed for upon Count I herein, plaintiffs pray for judgment * * *." Having sought a trial first of their equitable claim, they cannot complain of the ruling of the District Court that their equitable claim will be tried first.

Nor can they complain of the refusal of the District Court to grant them leave to again amend their amended complaint, even though they did propose to withdraw Count I, and replead their action at law. The District Court has wide discretion under Rule 15, F.R.Civ.P., in granting or denying leave to amend a complaint which has already been amended once. *Grombach v. Oerlikon Tool and Arms Corp. of America,* 276 F.2d 155, 165 (C.A. 4, 1960); *McHenry v. Ford Motor Co.,* 269 F.2d 18, 24 (C.A. 6, 1959); 3 *Moore's Federal Practice* (2nd Ed.), ¶ 15.08[4], p. 895. Whether the Court has abused its discretion cannot be reviewed in a mandamus proceeding filed under the All Writs Act, 28 U.S.C. 1651(a). *Platt v. Minnesota Mining and Mfg. Co.,* 376 U.S. 240, 245; *Ex parte Bradstreet,* 7 Peters (32 U.S.) 634, 647.

IV.

Respondents concede in their brief, p. 9, ¶ I, pp. 11-12, that they seek equitable relief in Count I, but they characterize it as "some equitable relief," leaving the inference that other relief is sought, but this is not correct. All of the relief which they seek in Count I is historically

and traditionally equitable in nature, and their claim does not cease to sound in equity simply because it arises out of an alleged breach of a fiduciary relation. A breach of fiduciary relation might be grounds for a tort action, but Count I is not that kind of an action. The nature of Count I must be judged from the remedy sought and not from allegations upon which the remedy is based. Were this not true, then there would be no equitable actions because the wrong could be remedied by an action at law for damages.

Equitable claims generally involve issues of fact, but this does not create a legal claim entitling a party to a jury trial. *Shubin v. United States District Court,* 313 F.2d 250, 251 (C.A. 9, 1963), cert. den. 373 U.S. 936.

The prerequisite to an action in equity is the absence of an adequate remedy at law. *Beacon Theatres v. Westover,* 359 U.S. 500, 510; *Dairy Queen v. Wood,* 369 U.S. 469, 478. Respondents pleaded Count I on the basis of no adequate remedy at law, and asked that that count be first tried. They pleaded Count II only in the event they could not prevail on Count I, and impleaded additional defendants against whom no relief is sought in Count I. Under these conditions the District Judge, in the exercise of his discretion, correctly proceeded with the trial of Count I, following the order in which the two counts were pleaded, until his action was improperly stayed. That he had this discretion was settled in *Beacon Theatres, supra,* at p. 510, and whether he correctly exercised his discretion is not a matter properly brought to this Court.

V.

The Brief in Opposition shows no reason why the petition for certiorari should not be granted. Therefore, we respectfully submit that the Court should grant this petition for certiorari and summarily reverse, without the necessity for additional briefs or for oral argument, the judgment of the Court of Appeals, and order it to dismiss the petition for a writ of mandamus.

Respectfully submitted,

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